Supreme Court, U.S.
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No. 96-1100

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WARWICK MALL TRUST, *et al.*,
Petitioners,
v.
STATE OF RHODE ISLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Rhode Island

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. May a petition for certiorari be filed to review a state final judgment entered more than 90 days earlier?

2. May this Court review on certiorari a federal claim not raised in the state court below?

3. Did the Rhode Island courts violate the First and Fourteenth Amendments when, in dismissing a complaint for failure to state a claim upon which relief could be granted, they observed that state statutes are presumed constitutional unless shown otherwise beyond a reasonable doubt?

LIST OF PARTIES

Appellants in the Supreme Court of Rhode Island, petitioners here, were Warwick Mall Trust, Bliss Properties, Inc., and Irving Schwartz. Appellees in that court, respondents here, are the State of Rhode Island, Governor Lincoln C. Almond, and Providence Place Group Limited Partnership.

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BRIEF IN OPPOSITION

JURISDICTION

As is discussed below, this Court lacks jurisdiction because the petition for certiorari was not filed within the time prescribed by 28 U.S.C. § 2101(c), and the federal right asserted was not claimed or denied in the court below as required by 28 U.S.C. § 1257(a).

STATEMENT

Petitioners, the owners and operators of a shopping mall in Warwick, Rhode Island, sued in Rhode Island Superior Court seeking a declaration that a Rhode Island statute, which authorized various tax and other incentives to a new shopping mall as part of the redevelopment of downtown Providence, violated the Rhode Island and United States Constitutions.[1] The Superior Court dis-

[1] The complaint alleged, in addition to many state-law claims, that the statute denied due process of law and equal protection of

missed the complaint under Rhode Island Superior Court Rule 12(b)(6) for failure to state a claim upon which relief could be granted, observing that state statutes in Rhode Island enjoy a presumption of constitutionality unless shown otherwise beyond a reasonable doubt.

On appeal to the Supreme Court of Rhode Island, petitioners in a 95-page brief made no claims of violation of any federal law or constitutional provision. They did argue that Rhode Island's well-established presumption that state statutes are constitutional unless shown otherwise beyond a reasonable doubt [2] somehow conflicted with this Court's decision in *44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. 1495 (1996). Opening Brief for Plaintiffs-Appellants, No. 96-162, Sup. Ct. of R.I., at 91-93, pp. 4a-5a, *infra*.[3]

Respondents asked the Supreme Court to expedite its decision because "[t]he pendency of this appeal is impeding the completion of the financing necessary for the Providence Place Mall development." Memorandum of Appellees, Supreme Court of Rhode Island, filed June 4, 1996, at 3. The Supreme Court did so. It heard argu-

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the laws under the Fourteenth Amendment, and that delegation of state legislative powers to a state agency violated unspecified provisions of the United States Constitution. None of those federal arguments was repeated in the Supreme Court of Rhode Island.

[2] "[L]egislative enactments of the General Assembly are presumed to be valid and constitutional . . . and the party challenging the constitutional validity of the statute carries the burden of persuading the court beyond a reasonable doubt that the legislation violates an identifiable aspect of the constitution."

Dowd v. *Rayner*, 655 A.2d 679, 681 (R.I. 1995); see also, *e.g.*, *Chartier Real Estate Co.* v. *Chafee*, 101 R.I. 544, 225 A.2d 766 (1967).

[3] Reproduced in the addendum are the Questions Presented in petitioners' brief in the Supreme Court of Rhode Island, and the portion of their argument that challenged the presumption of constitutionality. In their petition they no longer rely on *44 Liquormart*.

ment on July 19, 1996, and the same day entered an order affirming the dismissal; its order stated that the judgment "is hereby affirmed," and added that "[a]n opinion setting forth the reasons for this order will follow." Pet. Cert. App. A-1.[4] On October 11, 1996, an opinion was issued in which the court explained the reasons for the affirmance it had entered in July. Pet. Cert. App. A-4.

REASONS FOR DENYING THE WRIT

I. THIS COURT LACKS JURISDICTION BECAUSE THE PETITION FOR CERTIORARI WAS FILED OUT OF TIME.

This Court lacks jurisdiction because the petition for certiorari was filed after expiration of the ninety days prescribed by 28 U.S.C. § 2101(c) and this Court's Rule 13.1.[5] The Supreme Court of Rhode Island on July 19, 1996 entered its decision affirming the judgment dismissing petitioners' complaint. Pet. Cert. App. A-1. The petition for certiorari was not filed until January 9, 1997, 174 days later. The time requirement of § 2101(c) is jurisdictional. *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990). "A petition for certiorari in a civil case must be filed within 90 days of the entry of the judgment below."

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[4] On July 22, 1996, the next business day after losing in the Supreme Court, two of the petitioners filed yet another lawsuit seeking to block enforcement of agreements implementing the legislation for the new mall. The Supreme Court of Rhode Island expedited that case also, and rejected petitioners' claims in an order entered September 12, 1996. *Sasso* v. *State*, No. 96-416, Sup. Ct. of R.I.

[5] Title 28 U.S.C. § 2101(c) provides:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

FEC v. *NRA Political Victory Fund*, 115 S. Ct. 537, 539 (1994).

The petition was filed instead on the ninetieth day after the subsequent explanatory opinion issued. But this Court's "power is to correct wrong judgments, not to revise opinions." *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945); *accord*, *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956). Under 28 U.S.C. § 1257(a), it is "[*f*]*inal judgments or decrees* rendered by the highest court of a State in which a decision could be had" that this Court reviews on certiorari. (Emphasis supplied.)[6] Under § 2101 (c), such review must be sought within ninety days. "When the case is decided, the time to seek our review begins to run." *Market Street Ry.* v. *Railroad Comm'n*, 324 U.S. 548, 552 (1945); see also *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942).[7] Here the "[f]inal judgment[] or decree[]" was entered July 19, 1996. No rehearing was sought or granted. The petition is out of time.

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[6] Title 28 U.S.C. § 1257(a) provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

[7] "[T]he test is . . . whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court . . . . Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order." 317 U.S. at 268. Similarly in federal practice, "[w]here, as here, a formal judgment is signed by the judge, this is *prima facie* the decision or judgment rather than a statement in an opinion or a docket entry." *United States* v. *Hark*, 320 U.S. 531, 534-35 (1944) (footnote omitted).

II. THE FEDERAL QUESTION WAS NOT RAISED BELOW.

Petitioners argue that, by stating that statutes are presumed constitutional unless shown to be otherwise beyond a reasonable doubt, Rhode Island's courts have violated the First and Fourteenth Amendments to the Constitution of the United States. Pet. Cert. 16, 22. But petitioners did not make any claim in the courts below that the presumption of constitutionality violated those provisions. They asserted in their brief to the Supreme Court of Rhode Island that Rhode Island's long-established presumption of constitutionality somehow conflicted with the standard for motions to dismiss in Rhode Island Superior Court Rule of Civil Procedure 12(b)(6), and in some unspecified manner with this Court's decision in *44 Liquormart, supra.* See pp. 3a-5a, *infra.* Nowhere did they claim a violation of the First or Fourteenth Amendments. Nor did the Rhode Island Supreme Court—which rejected petitioners' objection to the presumption of constitutionality in a single sentence—refer to any federal law or authority. See Pet. Cert. App. A-21 - A-22. Under 28 U.S.C. § 1257(a), the defect is jurisdictional. Moreover, even in federal cases "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Youakim* v. *Miller,* 425 U.S. 231, 234 (1976), quoting *Duignan* v. *United States,* 274 U.S. 195, 200 (1927); see also, *e.g., Delta Air Lines, Inc.* v. *August,* 450 U.S. 346, 362 (1981).

III. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

Petitioners' constitutional claim is insubstantial. They object to having their complaint dismissed for failure to state a cause of action, and assert that somehow they were denied due process because Rhode Island describes its legal presumption of constitutionality as one beyond

a reasonable doubt. They do not show that as a practical matter that formulation amounts to anything different from the presumption of constitutionality this Court and nearly all others traditionally apply. *E.g., Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust,* 508 U.S. 602, 637 (1993).

In any event, that judicial deference to legislative judgment played no crucial role in the outcome here. As the Supreme Court of Rhode Island pointed out, "Here, there were no material facts in dispute that were outcome determinative." Pet. Cert. App. A-21. The decision upholding the state statute was purely one of state law. Petitioners did not proffer to the Rhode Island courts any facts that would alter that legal outcome, nor do they do so here.

Petitioners argue they were denied due process, citing cases holding that litigants may not be denied access to the courts and a fair opportunity to present their evidence. *E.g., Richards* v. *Jefferson County,* 116 S. Ct. 1761 (1996); *Wolff* v. *McDonnell,* 418 U.S. 539, 579 (1974). But petitioners enjoyed full due process rights here. Their case failed on legal grounds; there was no material evidence to present. Petitioners assert that their argument "cannot be avoided on the basis of the claim that there were no factual questions raised by their pleadings." Pet. Cert. 20. But that is incorrect. Litigants are thrown out of court every day for failure to state a claim. *Cf.* Rule 12(b)(6), Fed. R. Civ. P. Familiar pleading rules treat factual allegations as true, but not legal ones. See *Conley* v. *Gibson,* 355 U.S. 41, 45-46 (1957). Due process may guarantee some right to file a complaint, but not a right to have a court hold it legally sufficient.

With or without a presumption of constitutionality—which is a legal, not an evidentiary, presumption—petitioners failed as a matter of law to allege any legally sufficient reason to hold the Rhode Island statute invalid. To enter judgment against a party who has failed as a

matter of law to state a claim violates no constitutional provision.

CONCLUSION

For the reasons stated, the petition should be dismissed or certiorari should be denied.

Respectfully submitted,

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January 17, 1997

ADDENDUM

ADDENDUM

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

SUPREME COURT

No. 96-162 APPEAL

WARWICK MALL TRUST, BLISS PROPERTIES, INC.,
and IRVING SCHWARTZ,

Appellants,

v.

THE STATE OF RHODE ISLAND, THE HONORABLE LINCOLN C. ALMOND, in his capacities as Governor of the State of Rhode Island and Chairman of the Rhode Island Economic Development Corporation, and Providence Place Group,

Appellees.

On appeal from the
Superior Court for Providence County,
Case No. PC 95-4960

OPENING BRIEF FOR PLAINTIFFS-APPELLANTS
WARWICK MALL TRUST,
BLISS PROPERTIES, INC., AND IRVING SCHWARTZ

* * * *

[8] QUESTIONS PRESENTED

1. Whether P.L. 95-400's provisions regarding the City of Providence's tax treaty are valid, despite that statute's lack of approval by the voters of Providence in the referendum required by R.I. Const. Article XIII, § 4?

2. Whether P.L. 95-400's provisions requiring future payments of sales tax revenues to the Providence Place Mall's developers' lenders are valid, despite P.L. 95-400's lack of approval by the voters of Rhode Island in the referendum required by R.I. Const. Article VI, § 16, in view of plaintiffs' proffered evidence that Governor Almond told the Board of the Economic Development Corporation that a failure by a future General Assembly to appropriate such funds would ruin the State's credit rating?

3. Whether P.L. 95-400's provisions vesting tax-exempting power in unelected political appointees are repugnant to the separation of powers doctrine?

4. Whether the challenged statute's predictive legislative "findings," the majority of which do not pertain to currently-existing factual circumstances, are entitled to great deference by the judiciary amounting to preclusive and conclusive effect?

[9] 5. Whether a party challenging the Constitutionality of a statute has the burden, at the pleading stage, to establish the un-Constitutionality of the challenged statute "beyond a reasonable doubt," which is a standard significantly more rigorous than the usual Rule 12(b)(6) standard?

* * * *

[90]

V. THE SUPERIOR COURT ERRED IN GRANTING DEFENDANTS' RULE 12(b)(6) MOTION AND BY HOLDING THAT PLAINTIFFS HAD THE BURDEN, AT THE PLEADING STAGE, TO ESTABLISH THE UNCONSTITUTIONALITY OF THE CHALLENGED STATUTE "BEYOND A REASONABLE DOUBT," WHICH IS A STANDARD SIGNIFICANTLY MORE RIGOROUS THAN THE USUAL RULE 12(b)(6) STANDARD.

The trial court erred in failing to apply the usual Rule 12(b)(6) standard. The legal standard to be applied in passing upon a motion to dismiss is whether plaintiff would have a legal right to relief under any set of facts that fit within the compass of the complaint, and in this regard the well-pled allegations of the complaint must be accepted as true. *Warth v. Seldin,* 422 U.S. 490, 501 (1975). Furthermore, the court must draw all reasonable inferences in favor of the non-movant. *Allen v. West Point-Pepperell, Inc.,* 945 F.2d 40, 44 (2d Cir. 1991). A motion to dismiss can be granted only when it appears *beyond doubt* from an examination of the complaint that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

The trial court stood this standard on its head. The trial court erroneously imposed a "beyond a reasonable doubt" standard upon *plaintiffs.* In doing so, the Superior Court alluded to language form [*sic*] the Rhode Island Supreme Court's opinion in *Chartier Realty Company, Inc.* v. Chaffee [*sic*], 101 R.I. 544 (1967), which the Superior Court took to suggest that the legal standard to be [91] applied in this case was whether plaintiffs' complaint standing alone, had established the un-Constitutionality of the challenged statute "beyond a reasonable doubt." [App. Tab 4, pp. 12-18]. The "beyond a reasonable doubt" standard applies to factual matters, and usually

in a criminal case. A motion to dismiss tests only the legal sufficiency of a complaint, and cannot establish contested facts. In dismissing plaintiffs' claims involving the referendum-on-debt requirement and the non-delegation doctrine, the Superior Court essentially resolved all possible factual disputes against plaintiffs and in favor of the challenged legislation.

The Superior Court's ruling erects a barrier that few if any complaints challenging legislative enactments could ever overcome, especially when plaintiff's theory is that a facially-neutral statute is discriminatory in effect or as applied.

A perfect example of why the Superior Court's allocation of burdens is unworkable and inequitable is found in the Rhode Island liquor-price advertising ban case, *44 Liquormart, Inc. v. Rhode Island*, 1996 WL 241709 (May 13, 1996):

> The parties stipulated that the price advertising ban is vigorously enforced, that Rhode Island permits "all advertising of alcoholic beverages excepting references to price outside the licensed premises," and that petitioners' proposed ads do not concern an
> [92] illegal activity and presumably would not be false or misleading. *44 Liquor Mart, Inc. v. Racine*, 829 F.Supp. 543, 545 (D.R.I. 1993). *The parties disagreed, however, about the impact of the ban on promotion of temperance in Rhode Island. On that question the District Court heard conflicting expert testimony and reviewed a number of studies.*

44 Liquormart, Inc. v. Rhode Island, 1996 WL 241709, *5. The United States Supreme Court's opinion makes clear that fact-finding, not the use of blunderbuss presumptions, is required:

> However, without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will sig-

nificantly advance the State's interest in promoting temperance.

Id., 1996 WL 241709, *12. This is a classic question of fact that cannot be resolved by reading the pleadings. There is an exact parallel here to appellants' claim regarding the obligation EDC will undertake to the Providence Place Mall's lenders being a State debt. However, the Superior Court disregarded plaintiffs' proffered evidence, and decided the case on an improper presumption.

If the Superior Court's application of the law is correct in this case, the United States Supreme Court's application of the law in *44 Liquormart* was error. Applying the Superior Court's reasoning to the *44 Liquormart* case results in a decision that plaintiffs there had failed at the pleading stage to demonstrate beyond a reasonable doubt that Rhode Island's price advertising [93] ban was un-Constitutional, because their case depended on disputed facts that must be resolved in favor of the challenged enactment.

If it is upheld, the Superior Court's application of *Chartier* will have an immediate chilling effect across a broad spectrum of rights.

* * * *